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OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF DELAWARE

Attorney General Opinion No. 18-IB22

May 1, 2018

VIA EMAIL

Randall Chase
rchase@ap.org

RE: FOIA Correspondence Regarding the Delaware Office of Defense Services

Dear Mr. Chase:

I write in response to your correspondence alleging that the Delaware Office of Defense Services ("ODS") violated the public records provisions of Delaware's Freedom of Information Act, 29 *Del. C.* §§10001-10007 ("FOIA") in connection with your February 12, 2018 request for records. Specifically, you allege that ODS violated FOIA by denying your request for records relating to defense attorney costs regarding the representation of 18 individuals. I treat your correspondence as a petition for a determination pursuant to 29 *Del. C.* §10005 regarding whether a violation of FOIA has occurred or is about to occur ("Petition"). Based upon the record, it is my determination that ODS violated FOIA by denying your request for records relating to defense attorney costs in its entirety. While I herein determine that the expense and costs associated with the legal representation of these individuals must be disclosed, such information may be disclosed in an aggregated, de-identified manner so as to protect the confidentiality and privacy concerns detailed in ODS' response to your petition.

On February 12, 2018, you sent a FOIA request to ODS for the following:

1. Copies of all records related to defense attorney costs regarding the representation of the 18 individuals indicted in connection with the Feb. 1-2 2017 disturbance at James T. Vaughn Correctional Center, including, but not limited to, records of payments to each attorney, billing records of each attorney, vouchers, receipts and expense forms.

2. Copies of all emails sent or received by ODS staff involving actual and estimated costs related to defense services for the 18 defendants.

On March 20, 2018, ODS's FOIA Coordinator, Jonathan Offredo, sent you a letter via email denying your request pursuant to 29 *Del. C.* § 10002(l)(9). On March 21, 2018, you responded to Mr. Offredo stating that you did not believe that the pending or potential litigation to be applicable. You stated that you would allow ODS until the close of business on Friday, March 23, 2018, to reconsider its position. On March 23, 2018, ODS informed you that it was standing by its original response.¹ Thereafter, your petition was timely filed and ODS timely responded.

This Office has previously determined that, as a general matter, records reflecting the expenditure of public funds for outside or private legal counsel are public records under FOIA.² One possible exception, which is not before me, is where the litigation expenses relate to the subject matter of pending or potential litigation.³ It is undoubtedly true that documents containing the costs to a public body incurred in order to prosecute or defend its pending litigation "pertain" to such litigation. But that logic posits that it would be permissible to withhold costs of *any and all* of its litigation. That outcome would effectively prevent Delaware citizens from obtaining a reliable assessment of government's function and efficiency. The creation of a rule that permits a public body to hide its litigation costs would result in an absurdity and would substantially undermine FOIA's effort to ensure transparency in government operation. As such, to the extent ODS has records reflecting records relating to defense attorney costs, including who received such payments and in what amounts, those records must be disclosed.

¹ You and Mr. Offredo exchanged several emails on March 21, 2018. I have reviewed those emails and deem them part of the record in the instant matter.

² See, e.g., *Del. Op. Att'y Gen.* 04-IB07, 2004 WL 771853, at *1 (Mar. 8, 2004) ("FOIA does not exempt the disclosure of information in the billing statements that will enable citizens to calculate the dollar amounts paid by the County to Oberly Jennings."); *Del. Op. Att'y Gen.* 02IB16, 2002 WL 31031225, at *1 (July 30, 2002) (concluding that letter of engagement without outside legal counsel and billing statements are public records).

³ See, e.g., *Mell v. New Castle County*, 835 A.2d 141, 149 (Del. Super. 2003) ("The requests relating to invoices and the payment of invoices from lawyers and law firms known to be representing County employees in connection with the Federal investigation *pertain to matters at issue* in pending litigation and therefore are not subject to FOIA.") (emphasis added).

One other analytical step in addressing certain of ODS's arguments needs mention. ODS, its constituent parts, and each of its employees and contractors fill a vital role in our justice system. ODS zealously advocates for indigent people accused of criminal conduct.⁴ It is not only reasonable that ODS raise defenses to production of the records you are seeking; it is their constitutionally imposed obligation and duty to do so. Essentially, you have requested that a law firm involuntarily disclose the content of its communications with its clients, reveal the mental impressions of its lawyers, and disclose the strategies it intends to deploy in defense of those clients. The confidentiality and privacy arguments they raise in defense of your request are necessarily and appropriately derivative of the rights of their clients.⁵ FOIA was never meant to occasion a departure from bedrock principals of our system of criminal justice, particularly when it would likely be of constitutional dimension. Therefore, while certain of the records you have requested must be disclosed, ODS may redact responsive records which *in any way* touch upon the work product of legal counsel (and the agents of such legal counsel) assigned to the individuals referenced in your request. Similarly, to the extent that you have requested attorney-client communications of any kind, ODS is legally permitted to redact or exclude such communications pursuant to 29 *Del. C.* § 10002(1)(6).⁶

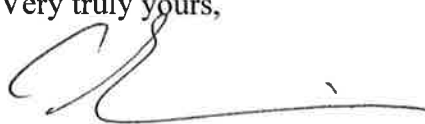
⁴ *Gideon v. Wainright*, 372 U.S. 335, 345 (1963) (“[I]n our adversary system of criminal justice, any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is appointed . . . This seems to us an obvious truth.”).

⁵ *See Texaco, Inc. v. Phoenix Steel Corp.*, 264 A.2d 523, 525 (Del. Ch. 1970) (“[T]he privilege belongs to the client and only [she or] he may waive it.”).

⁶ *See, e.g., Del. Op. Att’y Gen.* 05-IB18, 2005 WL 2334346 (July 8, 2005) (citations omitted) (“We believe that other matters relating to outside legal counsel, however, are protected by attorney-client privilege under FOIA. Specific litigation objectives, how much resources to deploy, the legal issues being researched, and parameters for potential settlement are just a few of the [sic] matters which we believe FOIA allows a public body to discuss in private. ‘A basic understanding of the adversary system indicates that certain phases of litigation strategy may be impaired if every discussion is available for the benefit of opposing parties who may have as a purpose a private gain in contravention of the public need’ for confidentiality.”); *Del. Op. Att’y Gen.* 02IB16, 2002 WL 31031225, at *1 (certain records responsive to request for “agreements or correspondence” with outside counsel exempted pursuant to 29 *Del. C.* § 10002(1)(6) “either by attorney-client privilege or work product immunity”).

Under the circumstances, it is my determination that ODS's wholesale denial of your request pursuant to 29 *Del. C.* § 10002(l)(9) violated FOIA. I have also determined that you have requested certain records that are outside of FOIA's definition of "public record." I recommend that ODS provide any records in ODS's possession demonstrating costs paid to individual attorneys or firms, and subject to redaction of information exempted pursuant to 29 *Del. C.* § 10002(l)(6) or other applicable FOIA exemptions, within fifteen business days of this determination.⁷

Very truly yours,



Aaron R. Goldstein
Chief Deputy Attorney General

cc: Michelle E. Whalen, Deputy Attorney General (via email)
Brendan O'Neill, Esq. (via email)

⁷ FOIA does not require the creation of records to respond to a FOIA request. *Del. Op. Att'y Gen.* 07-IB19, 2007 WL 473802 (Aug. 28, 2007). Nonetheless, the generation of a new record that aggregates and identifies the costs and expenses associated with the defense of the 18 individuals you have identified would be one way to satisfy ODS's obligation to respond to your FOIA request.